

SENATE BILL NO. 550

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on

on \_\_\_\_\_)

(Patron Prior to Substitute--Senator Bell)

A BILL to amend and reenact §§ 2.2-4354 and 11-4.6 of the Code of Virginia, relating to contracts; payment clauses to be included; right to payment of subcontractors.

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 2.2-4354 and 11-4.6 of the Code of Virginia are amended and reenacted as follows:**

**§ 2.2-4354. Payment clauses to be included in contracts.**

Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with § 2.2-4352, shall include:

1. A payment clause that obligates the contractor to be individually liable for the entire amount owed to any subcontractor with which it contracts. Such contractor shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor. However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor. Any provision in a contract contrary to this section shall be unenforceable.

2. A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:

a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or

27 b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the  
28 subcontractor's payment with the reason for nonpayment.

29 ~~2-3.~~ A payment clause that requires (i) individual contractors to provide their social security  
30 numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer  
31 identification numbers.

32 ~~3-4.~~ An interest clause that obligates the contractor to pay interest to the subcontractor on all  
33 amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor  
34 of payment from the state agency or agency of local government for work performed by the subcontractor  
35 under that contract, except for amounts withheld as allowed in subdivision ~~1~~ 2.

36 ~~4-5.~~ An interest rate clause stating, "Unless otherwise provided under the terms of this contract,  
37 interest shall accrue at the rate of one percent per month."

38 Any such contract awarded shall further require the contractor to include in each of its subcontracts  
39 a provision requiring each subcontractor to include or otherwise be subject to the same payment and  
40 interest requirements with respect to each lower-tier subcontractor.

41 A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment  
42 clause in this section shall not be construed to be an obligation of the state agency or agency of local  
43 government. A contract modification shall not be made for the purpose of providing reimbursement for  
44 the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the  
45 interest charge.

46 **§ 11-4.6. Liability of contractor for wages of subcontractor's employees.**

47 A. As used in this section, unless the context requires a different meaning:

48 "Construction contract" means a contract between a general contractor and a subcontractor relating  
49 to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto,  
50 including moving, demolition, and excavation connected therewith, or any provision contained in any  
51 contract relating to the construction of projects other than buildings.

52 "General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that  
53 those terms shall not include persons solely furnishing materials.

54 B. Any contract in which there is at least one general contractor and one subcontractor shall be  
55 deemed to include a provision under which any higher-tier contractor is individually liable to any lower-  
56 tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the  
57 subcontractor's duties under the contract. Such contract shall require such higher-tier contractor to pay  
58 such lower-tier subcontractor within 45 days of the satisfactory completion of the subcontractor's duties.  
59 Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by  
60 the subcontractor. However, in the event that a contractor withholds all or a part of the amount promised  
61 to any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing,  
62 of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.  
63 Payment by the party contracting with the contractor shall not be a condition precedent to payment to any  
64 lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that  
65 contractor, unless the party contracting with the contractor is a debtor in bankruptcy as defined in § 50-  
66 73.79. Any provision in a contract contrary to this section shall be unenforceable. Failure of a contractor  
67 to make timely payment as provided in this subsection shall result in interest penalties consistent with §  
68 2.2-4355.

69 ~~B.-C.~~ Any construction contract entered into on or after July 1, 2020, shall be deemed to include a  
70 provision under which the general contractor and the subcontractor at any tier are jointly and severally  
71 liable to pay any subcontractor's employees at any tier the greater of (i) all wages due to a subcontractor's  
72 employees at such rate and upon such terms as shall be provided in the employment agreement between  
73 the subcontractor and its employees or (ii) the amount of wages that the subcontractor is required to pay  
74 to its employees under the provisions of applicable law, including the provisions of the Virginia Minimum  
75 Wage Act (§ 40.1-28.8 et seq.) and the federal Fair Labor Standards Act (29 U.S.C. § 201 et seq.).

76 ~~C.-D.~~ A general contractor shall be deemed to be the employer of a subcontractor's employees at  
77 any tier for purposes of § 40.1-29. If the wages due to the subcontractor's employees under the terms of  
78 the employment agreement between a subcontractor and its employees are not paid, the general contractor  
79 shall be subject to all penalties, criminal and civil, to which an employer that fails or refuses to pay wages

80 is subject under § 40.1-29. Any liability of a general contractor pursuant to § 40.1-29 shall be joint and  
81 several with the subcontractor that failed or refused to pay the wages to its employees.

82 ~~D.~~E. Except as otherwise provided in a contract between the general contractor and the  
83 subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest,  
84 penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's  
85 employees as provided in subsection ~~B.~~C., unless the subcontractor's failure to pay the wages was due to  
86 the general contractor's failure to pay moneys due to the subcontractor in accordance with the terms of  
87 their construction contract.

88 ~~E.~~F. The provisions of this section shall only apply if (i) it can be demonstrated that the general  
89 contractor knew or should have known that the subcontractor was not paying his employees all wages  
90 due, (ii) the construction contract is related to a project other than a single family residential project, and  
91 (iii) the value of the project, or an aggregate of projects under one construction contract, is greater than  
92 \$500,000. As evidence a general contractor may offer a written certification, under oath, from the  
93 subcontractor in direct privity of contract with the general contractor stating that (a) the subcontractor and  
94 each of his sub-subcontractors has paid all employees all wages due for the period during which the wages  
95 are claimed for the work performed on the project and (b) to the subcontractor's knowledge all sub-  
96 subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such  
97 wages. Any person who falsely signs such certification shall be personally liable to the general contractor  
98 for fraud and any damages the general contractor may incur.

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